Puspita Corp Sdn Bhd & Ors v Berjuntai Tin Dredging Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–183–1993
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND EUSOFF CHIN SCJJ
2 AUGUST 1994

Land Law *— Mining land — Lease — Expiry — Grant of new lease to another party — Whether ilmenite stockpiled on land belonged to previous lessee or new lessee — Whether minerals were rock material — Whether new lease ultra vires — Effect of expiry of lease — Whether ilmenite reverted to the State — National Land Code 1965 s 5 & Form 4C*

Administrative Law *— Exercise of administrative powers by land administrator — Mining permit to remove minerals stockpiled on land — Whether permit was ultra vires as minerals belonged to previous lessee of land*

The respondent held several mining leases, one of which was in respect of Lots 1578 and 1579, Mukim of Batang Berjuntai, Selangor ('the lots'). The lease expired on 25 August 1985 and although the respondent applied to renew the lease, it did not receive any response from the state authority. On 25 April 1990, the land administrator for Kuala Selangor, the third appellant, issued to the first appellant a permit in Form 4C of the National Land Code 1965 ('the NLC') to extract and remove the mineral 'ilmenite' from the lots. The plaintiff applied by way of originating summons for, inter alia: (i) declarations that the ilmenite was its property and that the first appellant's permit was null and void; and (ii) an injunction restraining the first appellant from removing or extracting the ilmenite.

In granting the relief sought, the trial judge found that the ilmenite found on the lots had been recovered from the respondent's mining operations elsewhere and stockpiled there. The judge held that the ilmenite had not been abandoned by the respondent and was not rock material within s 5 of the NLC, as contended by the appellants. The appellants appealed.

Held, dismissing the appeal:

(1) There was unchallenged evidence that the ilmenite was derived from a system of processing and not by the forces of nature. Hence, the ilmenite was not rock material within s 5 of the NLC. The ilmenite was stockpiled on the lots, was capable of removal and had considerable commercial value. It had not been abandoned and continued to be the property of the respondent. There was no question of reversion to the state authority, by virtue of the NLC or the general law.

(2) As the ilmenite remained the property of the respondent, the expiry of the lease was irrelevant and did not adversely affect the respondent's title to the ilmenite.

(3) The second appellant had acted ultra vires its powers by issuing the permit purporting to authorize the first appellant to extract and remove the ilmenite. The judge was right in holding that the permit was null and void in so far as it authorized the first appellant to extract the ilmenite which was the property of the respondent, and in granting the injunction.

[Bahasa Malaysia summary

Responden memiliki beberapa pajakan perlombongan, satu daripadanya adalah untuk Lot 1578 dan 1579, Mukim Batang Berjuntai, Selangor ('lot itu'). Pajakan itu telah tamat pada 25 Ogos 1985 dan walaupun responden telah memohon untuk memperbaharui pajakan itu, ia tidak menerima sebarang jawapan daripada pihak berkuasa negeri. Pada 25 April 1990, pentadbir tanah bagi Kuala Selangor, perayu ketiga, telah mengeluarkan satu permit di dalam Borang 4C Kanun Tanah Negara 1965 ('KTN itu') kepada perayu pertama untuk mengekstrak dan mengeluarkan bahan galian amang (ilmenite) daripada lot itu. Plaintif telah memohon melalui saman pemula untuk, antara lain: (i) deklarasi bahawa amang itu adalah hartanya dan bahawa permit perayu pertama adalah batal dan tidak sah; dan (ii) suatu injunksi untuk menghalang perayu pertama daripada mengeluarkan atau mengekstrak amang itu.

Apabila membenarkan relief yang dipohon itu, hakim perbicaraan telah mendapati bahawa amang yang terdapat di atas lot itu telah dikeluarkan daripada operasi perlombongan responden di tempat lain dan disimpan stok di situ. Hakim itu telah memutuskan bahawa amang itu tidak dibuang oleh responden dan tidak merupakan bahan batuan mengikut s 5 KTN itu, seperti yang ditegaskan oleh perayu. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Terdapat keterangan yang tidak dicabar bahawa amang itu diperolehi daripada suatu sistem pemprosesan dan bukannya melalui daya semula jadi. Oleh demikian, amang tersebut tidak merupakan bahan batuan mengikut s 5 KTN itu. Amang tersebut telah disimpan stok di atas lot itu, boleh dikeluarkan dan mempunyai nilai komersil yang tinggi. Ia tidak dibuang dan terus menjadi harta responden. Soalan sama ada bahan itu telah kembali menjadi harta pihak berkuasa negeri di bawah KTN atau undang-undang am tidak timbul.

(2) Oleh kerana amang itu terus menjadi harta responden, penamatan pajakan itu tidak relevan dan tidak menjejaskan hakmilik responden ke atas amang itu.

A (3) Perayu kedua telah bertindak ultra vires kuasanya dengan mengeluarkan permit yang kononnya memberikuasa kepada perayu pertama untuk mengekstrak dan mengeluarkan amang itu. Hakim itu betul apabila memutuskan bahawa permit itu batal dan tidak sah setakat mana ia memberikuasa kepada perayu pertama untuk mengekstrak amang yang merupakan harta responden, dan apabila memberikan injunksi itu.]

B

Case referred to

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113; [1993] 2 CLJ 146 (refd)

C

Legislation referred to

National Land Code 1965 s 5, Form 4C

Appeal from: Originating Summons No 21–328–90 (High Court, D Shah Alam)

Low Hop Bing (*Siak Leong Song* with him) (*Low Hop Bing & Associates*) for the appellants.

P Thangaraj (*S Thomas* with him) (*Rashid & Lee*) for the respondent.

E

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): Broadly stated, the question for decision in this appeal is whether the judge (VC George J) was right in holding that the respondent (which was the plaintiff F in the court below), was entitled as against the appellants, Puspita Corp Sdn Bhd, the Government of the State of Selangor and the Land Administrator, Kuala Selangor (who were the first, the second and the third defendants, respectively, in the court below), to the declarations prayed for in the originating summons and, in consequence, to the injunction prayed for therein, as against Puspita Corp Sdn Bhd.

G

It would be more convenient to refer to the appellants and the respondents as the first, the second, the third defendants, and the plaintiff, respectively.

More particularly, the plaintiff had by its originating summons prayed for the following reliefs:

H

(i) a declaration that the mining material, in particular the ilmenite (commonly known as 'amang') found on the lands held under mining lease No 14 Mukim of Batang Berjuntai, Selangor is and continues to be the property of the plaintiff;

I (ii) a declaration that the permits issued by the second and/or the third defendants for the extraction and removal of rock material from Lots 1578 and 1579 (mining lease No 14) Mukim of Batang Berjuntai, Selangor, under Form 4C of the National Land Code 1965, is null and void;

(iii) an injunction against the first defendant to restrain its servants and/ or agents from removing, extracting or howsoever otherwise dealing with the mining materials in particular ilmenite (amang) from land held under mining lease No 14 Mukim of Batang Berjuntai, Selangor;

(iv) general damages against the first defendant; and

(v) such further or other relief as is just.

The *background facts* which led to the dispute the subject matter of the originating summons are set out in the judgment of the court below which, for convenience, we adopt.

By way of preliminary, the judge said this:

> At all relevant times the plaintiffs were the holders of several mining leases in respect of some 30 lots in the Mukim of Batang Berjuntai, Selangor. One of these mining leases in respect of Lots 1578 and 1579 that had been issued in favour of the plaintiffs was mining lease 14 (ML 14) which was due to expire on 25 August 1985. On 23 February 1984, the plaintiff had submitted their application for the renewal of this lease. It is to be noted that as at 25 April 1990 the plaintiffs had not obtained any response to the application.

The judge then returned to certain events which sparked off *the dispute* herein in these terms:

> On that date, 25 April 1990, the assistant land administrator for Kuala Selangor had issued in favour of the first defendant a National Land Code 1965 Form 4C permit dated 1 May 1990 to be valid until 31 May 1990 in respect of Lots 1578 and 1579 and another lot numbered 1559 permitting the removal of 'pasir hitam (amang)' from these lots. A similar permit was given to the first defendant in respect of Lots 1578 and 1579 for the further period 1 June 1990 up to 1 October 1990. The first defendant was required to deposit RM10,000 with the Land Office by way of security for the payment of royalty for the material to be removed from lots. The royalty to be charged was RM2.10/m^3 which apparently works out to RM1.05 per ton.
>
> It was on learning of the issue of those Form 4C permits that the plaintiffs caused the instant originating summons to issue seeking, inter alia, a declaration that the 'amang' on the said lots is the property of the plaintiffs and for an injunction restraining the first defendant, its servants and agents from removing the 'amang' from those lots. Damages and further and other relief as is just is sought. Pending the resolution of the proceedings in court the parties have agreed to have the status quo maintained — neither side would remove the 'pasir hitam (amang)' from these two lots.

The judge then described *the layout and location* of the lots concerned in these terms:

> Although Lots 1578 and 1579 are separated by a narrow strip of land (part of Lot 2241), for the purposes of this judgment they can be regarded as contiguous lots. Lot 1559 can be similarly regarded as contiguous to Lots 1578 and 1579 and lies to the north of those lots. Lot 1578 lies to the west of Lot 1579 and a lot numbered 514 lies to the east of Lot 1579. Between Lots 514 and 1579 is a road reserve with a secondary road on it.

A By this road, on Lot 514, is the plaintiffs' tin ore processing plant referred to in the tin industry as a tin-shed. This plant has been operational since about 1968. As has been seen, apart from ML14 the plaintiffs have unexpired mining leases in respect of those 30 lots of land. They comprise some 10,000 acres and are all in the vicinity of the tin-shed.

B The judge next touched generally and very briefly, on the plaintiff's *mining activities* in these terms:

> At all material times some of these lands were being mined for tin and other heavy minerals by the plaintiffs using some five tin dredges. Part of Lot 1578 was mined in 1960 and in 1981; Lot 1579 has never been mined.

C The judge also described, with clarity and in detail, the various steps in the plaintiff's *dredging operations* in the following terms:

> In the dredges the soil excavated from the ground by the dredge is dislodged from the dredge buckets on to a revolving screen. Oversized material like boulders and lumps of earth not broken up are discarded to the rear of the
> D dredge into the hole caused by the excavation called the dredge paddock. The smaller sized material is passed into a hopper and from there on to a series of jigs. This operation separates part of the lighter sand and soil from the heavier minerals. The separated sand and soil are also discharged to the rear of the dredge into the paddock. The material that is left on board the dredge is again processed to separate more of the sand which is also
> E discarded and what is left after this process is called dredge concentrate. It consists of various types of minerals, some heavier than the others, and sand. The dredge concentrate is about 2% of the aggregate of the material excavated by the dredge. The other 98%, as has been seen, is discarded by being discharged to the rear of the dredge into the paddock.
>
> F The dredge concentrate is transported to the tin-shed for processing where it is kept in bins. According to Encik S Pakianathan, a well-known consultant mining and mineral processing engineer called by the first defendant, 10–20% of the dredge concentrate is made up of various heavy minerals. The balance of 80–90% is sand which is made up of quartz, rock fragments and lighter minerals.
>
> G In the tin-shed the dredge concentrate is processed by having it passed down with flowing water on a series of sloping shaking tables. The material subjected to this process separates itself as it passes down the shaking tables into what is known in the industry as the head, the middlings and the table tails. According to Encik Mohd Ibrahim Hussain, the mines manager of the plaintiffs, at the head most of the material will be cassiterite concentrate (tin ore) being the heaviest mineral found in the area being mined. According to
> H him, in the middlings a substantial portion of the material will be the mineral ilmenite. There will also be some tin ore and other minerals like zircon and monozite. In the table tails will be sand, some ilmenite and other minerals and even some tin ore.
>
> The tin ore in the head is diverted from the shaking tables and is collected and dried and bagged and sent for further processing and smelting.
> I According to the mines manager, in the tin-shed at Batang Berjuntai, the middlings are discharged into a 'whims' separator and the ilmenite content is extracted by the use of a magnetic process. The non-magnetic material is recirculated with the rest of the material on the shaking tables. The zircon

and the monozite that are also separated in the tin-shed from the dredge concentrate are also dried and bagged before being sold.

The ilmenite which is next in value to the cassiterite is, according to the mines manager, not bagged but pumped on to the surface of the unmined portions of Lot 1578 and Lot 1579 to be stockpiled there at the points shown in the sketch plan D2 coloured brown and marked 1A and 1B. The ilmenite was, according to the mines manager, not bagged because it was recovered in large quantities. The zircon and the monozite were bagged because they were in smaller quantities. According to the mines manager the table tails were stockpiled at the areas coloured purple on D2 marked 3A and 3B. The stockpiling is done by having the tails pumped with water to the said areas where the material was to be dumped. The water drains off leaving the material in mounds on the surface of the land.

At the northern boundary of Lot 1578, near the strip of land separating Lots 1578 and 1579, the plaintiffs have what is called a silica plant. According to the mines manager, the mounds of table tailings dumped at points 3A and 3B on the sketch plan D2 is pushed into and pumped from a sump situated near the points 3A and 3B by what is known as the silica feed pump, into the silica plant. The silica plant is a retreatment plant and does a scavenging operation designed to get at the tin ore and ilmenite that had got past the tin-shed processing of the material. This silica plant has been operational since about 1978. The reclaimed tin ore is sent to the tin-shed. The ilmenite obtained by the scavenging exercise was, according to the mines manager, stockpiled at point 2 also coloured brown in D2. The waste material from the silica plant (ie after the scavenging operation) is called silica tailing and was discharged by being pumped with water into the area north of the silica plant. According to the mines manager, although the silica tailing has some mineral content, there is no viable method of treating it and accordingly it was discarded.

The judge then touched briefly on the *marketing and pricing* aspects of ilmenite (also commonly known in Malaysian mining jargon as 'amang'), in the following terms:

> The mines manager testified that the plaintiffs have been 'selling' the ilmenite stockpiled at the areas coloured brown in D2, to the plaintiffs' related company, its marketing arm called MMC Marketing Sdn Bhd at about RM20 per ton to be sold at the actual market value of ilmenite which in February 1990 was between RM200 to RM250 per ton. (It is relevant to pause and compare this with the royalty of about RM1.05 per ton that the defendants were expected to pay).

At this point, we would interpolate to observe that the term 'amang' is defined in the *Glossary of Geology* by Robert L Bates and Julia A Jackson, (2nd Ed) as 'A term used in Malaysia for the heavy iron and tungsten minerals (and associated minerals) found with placer cassiter deposits', a definition which we gratefully adopt. However, in this judgment, we shall, as did the judge in the court below, unless the context otherwise requires, use the term 'ilmenite' rather than 'amang', as technically speaking, this is the more correct term to use.

The judge next adverted to the *rival contentions* advanced on behalf of the plaintiff and the first defendant in these terms:

A In short the plaintiffs contend that the material on the surface of the land at points 1A and 1B in the sketch plan D2 is substantially ilmenite recovered either from the processing of the dredge concentrate in the tin-shed or from the processing in the silica plant of the table tailings and dumped at those points by way of stockpiling and not abandoned, has a value estimated at RM500,000 and belongs to the plaintiffs. They also contend that the B material at points 3A and 3B in the sketch plan D2 is table tailings from the tin-shed with a high content of ilmenite and other minerals which they have stockpiled awaiting processing in the silica plant. They contend that this material is also valuable and they gave it an estimated value of RM6m and they say it belongs to the plaintiffs. They contend that the lease ML14 having expired has no effect on their ownership of the said material. The C contend that neither the ilmenite nor the table tailings can be regarded as 'rock material' that can be given a permit for removal by a Form 4C permit and that in any event the state authority had no authority to permit the first defendant to remove that which belongs to the plaintiffs.

In effect the contention on behalf of the first defendant was that the material left on the two Lots 1578 and 1579 had been abandoned by the D plaintiffs and was rock material within the meaning given to 'rock material' in the National Land Code 1965.

The judge then directed his attention to the *expert evidence* adduced before him.

In the first place, he referred to the testimony of the first defendant's E expert, Mr S Pakianathan, and made his comments thereon, as follows:

> There was no doubt that he is an expert on mining and mineral processing. Although he had no firsthand knowledge of the activities of the plaintiffs at Batang Berjuntai, he could and substantially agreed with the testimony of the plaintiffs' witnesses as to what happens in the mining operations. Inter F alia, he confirmed that the dredge concentrate contains from 10–20% of heavy minerals, that separation takes place at the shaking tables into the head, middlings and tails and that the tin ore and the zircon and monozite are retrieved in the shed and are dried and bagged.
>
> Encik Pakianathan also confirmed that ilmenite and other minerals can be and are being retrieved from the table tailings by use of the silica G retreatment plant and it follows that the untreated table tailings have a value. It seems to me that since the silica retreatment plant has been and is still operational the plaintiffs' witnesses' testimony that the table tailings were not abandoned but stockpiled has to be accepted.
>
> Encik Pakianathan did not appear to be impressed by the plaintiffs' witnesses' testimony that the extracted ilmenite was stockpiled on top of the H soil at the points 1A, 1B and 2. He expressed the view that if it was to be stockpiled it would have been stockpiled in concrete bins inside the tin-shed. However, he had to concede that there was contemporaneous documentary evidence that showed that enormous quantities of ilmenite were available for sale. One transaction referred to in a letter dated 14 September 1989, at p 4 of exh P9, was for 2,365 tonnes. I Encik Pakianathan did testify that about quarter of that amount would occupy an area 10m x 10m x 1m. It seems to me that it has to be accepted that stock-piling of such large quantities in the tin-shed was for pragmatic reasons really out of the question.

The plaintiffs produced through their witness, Encik Lim Chee Wan, results of certain borings taken at different parts of Lots 1578 and 1579. One of these Encik Pakianathan agreed was near to the point 1A in D2 and another was close to the point 3A. Encik Pakianathan conceded that the boring results should be accepted as being reliable. The boring results confirmed the plaintiffs' contention that there was a stockpile at or about 1A in D2 of valuable material (in that it contained viably extractable heavy minerals) up to a depth of 4ft on top of the virgin ground and a stockpile also of valuable material up to a depth of 5ft on top of the virgin ground at or about the point 3A in D2. This reading of the bore hole results was a fact in effect specifically confirmed as being correct by Encik Pakianathan at p 72 of the notes of evidence.

In the second place, after observing that a substantial part of Mr Pakianathan's evidence was on the meaning of the word 'amang', he arrived at the following *conclusion*:

For the purposes of this case in fact there is no need to decide what the word (amang) means because I am satisfied on the evidence before me, beyond any doubt, that the plaintiffs had stockpiled on top of Lots 1578 and 1579 at the points referred to as 1A and 1B in D2 the ilmenite that they had recovered from the tin-shed operations and at the point 2 in D2 the ilmenite recovered from the silica retreatment operations plant. I am also equally satisfied on the evidence, that the plaintiffs had stockpiled table tailings from the tin-shed at points 3A and 3B extending up to the silica plant. I am satisfied that these are valuable and were not abandoned. They have been and continue to be the property of the plaintiffs.

The judge then ended his judgment by granting the plaintiff the following *reliefs*:

Accordingly I declared that the material lying on top of the virgin ground on Lots 1578 and 1579 at or about the points marked 1A and 1B and at the point 2 in the sketch plan exhibit D2 herein and at or about the points marked 3A and 3B in D2 was at all relevant times and continues to be the property of the plaintiffs to be dealt with as they choose.

In my judgment the said Form 4C permits issued in favour of the first defendant has reference to the said material lying on top of the virgin ground on Lots 1578 and 1579 and is of no effect in that the issuing authority had no authority to grant such a permit in respect of the property of the plaintiffs. Accordingly I declare that the said Form 4C permit is null and void.

The first defendant, its servants and/or agents are restrained from extracting and/or removing or otherwise howsoever dealing with the said material lying on top of the virgin ground on Lots 1578 and 1579.

I make no order in respect of the damages claimed. The first defendant will pay the costs of and incidental to the originating summons to the plaintiffs as taxed by the proper officer of the court.

Having regard to what we have said thus far, we consider that there are three *key issues* for the determination of this court, and they may be stated as follows:

(1) Whether the material, being the discharge from the plaintiff's tin-shed and silica plant, that is to say, the ilmenite, which had been dumped and found on Lots 1578 and 1579, and more particularly, identified on the plan D2, as the areas shaded purple and brown, respectively, is the property of the plaintiff?

(2) Whether, in law, the expiry of the plaintiff's mining lease ML14, on 25 August 1985, over the lots aforesaid, adversely affected the plaintiff's claims herein and, if so, how?

(3) Whether the National Land Code 1965 permit in Form 4C issued by the second and the third defendants to the first defendant, on 25 November 1990, was void and, if so, to what extent?

For brevity and convenience, we shall refer to the three key issues aforesaid, as 'the ownership issue', 'the mining lease issue' and 'the Form 4C lease issue', respectively.

The ownership issue

There was unchallenged evidence adduced on behalf of the plaintiff that the ilmenite was derived from a system of processing and not by the forces of nature; more particularly, that it was recovered from tin-shed operations and from the silica retreatment operations plan described by the judge.

Hence, the ilmenite was certainly not 'rock material' within the definition of that expression in s 5 of the National Land Code 1965 which says:

> 'rock material' means any rock, stone, granite, limestone, marble, gravel, sand, earth, laterite, loam, clay, soil, mud, turf, peat, coral, shell or guano within or upon any land, and includes also any bricks, lime, cement or other commodity manufactured therefrom; ...

It follows that the proposition that ilmenite takes the profile of the land to fall within the meaning and ambit of 'rock material' is quite untenable. And, having regard to the unchallenged evidence — as quite correctly pointed out by the judge — the ilmenite had considerable commercial value. Nor, for that matter, was it ever abandoned.

Similarly, there was unchallenged evidence adduced on behalf of the plaintiff, that the ilmenite was stockpiled on the lands concerned and, so, capable of removal.

Clearly, therefore, the ilmenite continued to be the property of the plaintiff, thereby ruling out any question of reversion thereof, to the state authority, by virtue of the National Land Code 1965 or the general law.

Accordingly, we would, answer the question posed regarding this part of the case, in favour of the plaintiff; that is to say, in the affirmative.

The mining lease issue

Regard being had to our conclusion that the ilmenite remained the property of the plaintiff, we fail to see how the expiry of the plaintiff's mining lease

over the lands concerned, to wit, mining lease 14, could be of any relevance to the ownership issue; in other words, we fail to see how it could in any way have adversely affected the title of the plaintiff to the ilmenite.

Accordingly, we would, answer the question posed regarding this part of the case, also in favour of the plaintiff, that is to say, in the negative.

The Form 4C permit issue

It is obvious that the state authority in issuing the Form 4C permit to the first defendant, purporting to authorize it to extract and remove the ilmenite, although the same was the property of the plaintiff, was acting ultra vires the powers conferred upon it both by the National Land Code 1965 and also the general law. In this context, we need no more than refer to the oft-quoted maxim 'nemo dat quod non habet' (freely translated, you cannot carve out something from nothing). The judge was, therefore, quite right, and indeed duty bound, to hold, as he did in fact hold, that the Form 4C permit was null and void in so far as it authorized the first defendant to extract the ilmenite which was the property of the plaintiff.

We would, therefore, answer the question posed regarding this part of the case, accordingly, that is to say, also in favour of the plaintiff.

It follows, that the judge was also correct in granting the injunction restraining the first defendant from dealing, interfering with and/or removing the ilmenite.

Looking back, and taking a second hard look at the present case, our evaluation of the factual matrix is that the contemporary documentary evidence clearly established that the ilmenite was the property of the plaintiff and was commercially valuable, that very considerable quantities thereof had been stockpiled by the plaintiff on the lands aforesaid and so the inevitable conclusion is that the judge was amply justified in giving judgment for the plaintiff as prayed for in the originating summons save and except as to damages. In these circumstances, the present case comes nowhere near the range of those cases where an appellate court would be justified in disturbing the findings of fact arrived at by the judge after a careful analysis of the evidence. (See *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113; [1993] 2 CLJ 146). Indeed, upon the evidence, no other verdict was possible.

In the result, we have no hesitation in dismissing this appeal with costs and affirming the judgment of the court below. Deposit to be paid to the plaintiff to account of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim